

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 12
Request for Regulatory)
Determination filed by the) [Docket No. 91-009]
LAW OFFICES OF DAVID)
ROSENBERG concerning) August 5, 1998
"Habilitation Services)
Ratesetting Manual" of) Determination pursuant to
the DEPARTMENT OF) Government Code Section 11340.5;
REHABILITATION) Title 1, California Code of
_____) Regulations, Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether an agency manual which has been duly adopted as a regulation pursuant to the Administrative Procedure Act ("APA") and incorporated by reference into the California Code of Regulations ("CCR") should be found to be an invalid and unenforceable "underground regulation" solely on the ground that the manual was *incorporated by reference* into the CCR rather than printed out in full.

The Office of Administrative Law has concluded that the manual has been properly adopted pursuant to the APA and is thus valid. Material that has been properly incorporated by reference into the CCR is no less valid than material that has been printed in the CCR.

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ISSUE

The Office of Administrative Law (“OAL”) has been requested¹ to determine whether the “Habilitation Services Ratesetting Manual” of the Department of Rehabilitation (“Department”), duly adopted as a regulation pursuant to the APA and incorporated by reference into Title 9, California Code of Regulations, Section 7337, is invalid and unenforceable solely on the ground that the Manual was *incorporated by reference* into the CCR rather than printed out in full.

ANALYSIS

Background

This request for determination focuses on an agency rule that has already been adopted as a regulation pursuant to the APA. The agency rule is the Habilitation Services Ratesetting Manual (“Manual”), which has been duly adopted pursuant to the APA, including public notice and OAL review. The Manual was adopted as a regulation by the Department of Rehabilitation, which is responsible for funding “habilitation services” for the developmentally disabled. According to Welfare and Institutions Code section 19352, subdivision (a):

“‘*Habilitation services*’ means those community-based services purchased or provided for adults with developmental disabilities including work activity and supported employment, to prepare and maintain them at their highest level of vocational functioning, or to prepare them for referral to vocational rehabilitation services.” [Emphasis added.]

The Department is directed by Welfare and Institutions Code section 19356 to adopt regulations setting rates for habilitation services.² The Department has complied with this statutory mandate by adopting Title 9, CCR, section 7337, which states that the Manual is “incorporated by reference.”³

Incorporation by reference is a longstanding and frequently used legal drafting technique. It is defined in Black’s Law Dictionary as follows:

“The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein. . . .”⁴

Whether The Incorporation Technique is Legal under the APA

The parties have set out and clarified their respective arguments in recent letters.

The requester argues that the practice of incorporating documents into the CCR is not only highly undesirable for various reasons from a policy perspective, but that “there *is no statutory authority* for the practice of incorporation by reference, and that therefore the incorporation of the Department’s Ratesetting Manual is invalid.” (Emphasis added.)⁵ Also, the requester correctly points out that language referring to incorporation was deleted from one APA provision (Government Code section 11344) in 1987.

Looking at the matter from a policy perspective, OAL agrees that having regulatory material printed in the CCR⁶ may often be more convenient for CCR users than having it printed in incorporated documents. Even assuming that dealing with incorporated documents is *always* less convenient for users,⁷ OAL nonetheless disagrees with the contention that incorporation is illegal.

Concerning the question of legality, OAL agrees that a substantial legal question would be presented if there were “no statutory authority” for the practice of incorporation by reference. The problem with the requester’s argument is that incorporation is indeed mentioned in an APA provision. The practice has been expressly sanctioned by the Legislature in Government Code section 11344.6, which provides in part:

“The courts shall take judicial notice of the content of each regulation which is printed or which is *incorporated by appropriate reference* into the California Code of Regulations as compiled by [OAL].” [Emphasis added.]

The plain meaning of section 11344.6 is apparent. Courts are directed to take judicial notice not only of regulatory material printed in the CCR, but also of regulatory material which has been “incorporated by appropriate reference.” Section 11344.6 makes no sense unless one assumes that some of the regulations adopted by agencies are “incorporated by appropriate reference” into the CCR.

Pursuant to APA rulemaking requirements, OAL has adopted a regulation which sets out strict conditions and procedures for incorporation.⁸ For instance, the state agency proposing to adopt a regulation which includes incorporated material must ensure that the incorporated material is reasonably available to the public during

the notice and comment period. The text of a regulation which incorporates a document must include “appropriate reference,” that is, the regulation text must identify the document by title and date of publication or issuance. The OAL regulation on incorporation is thus fully consistent with the APA, notably with the most directly applicable provision, Government Code section 11344.6.

The requester’s final argument relies heavily on the fact that language referring to incorporation was deleted from one APA provision (Government Code section 11344) in 1987.⁹ The deleted language stated that OAL:

“[s]hall . . . [p]rovide for the incorporation by appropriate reference of regulations which are impractical to include into the Administrative Code [CCR].” [Emphasis added.]

The significance of this 1987 deletion is that OAL was no longer *mandated* by statute to provide for incorporation: former section 11344 provided that OAL “shall” provide for incorporation. A reasonable interpretation of this amendment to section 11344, when considered together with Government Code section 11344.6 (directing courts to take judicial notice of incorporated regulations) was that the Legislature no longer wished to *mandate* that OAL allow incorporation. Thus, OAL was given the flexibility to modify or arguably even end this longstanding practice.

OAL disagrees with the requester’s argument that the Legislature’s decision in 1987 to delete the incorporation mandate from section 11344 had the effect of banning the practice. This argument sounds like an adaptation of the whimsical saying that “everything that is not prohibited, is mandatory.” The adapted maxim would read: “everything that is not mandatory, is prohibited.”

OAL disagrees with the implicit proposition that the Legislature in enacting legislation governing state agencies is limited to two choices: either mandating a certain activity or prohibiting it. In addition to imposing a duty, the Legislature may also grant a power. OAL would characterize the 1987 statutory change as transforming a duty into a power. The Legislature may have felt that it was desirable to provide OAL with the flexibility to deal with changing circumstances and developing technology. Whatever the legislative thinking behind the 1987 amendment to Government Code section 11344, the plain meaning of the APA, as amended, was (1) to mandate continued judicial notice of incorporated regulations

and (2) to sanction continued use by agencies and by OAL of the practice of incorporation.

Documents have been incorporated by reference into the CCR every year since 1987. The Legislature has amended the APA almost every year since 1987. It is significant that the Legislature has not acted to counteract OAL's continued use of incorporation.¹⁰

Indeed, if the decision were made to terminate the incorporation practice, it would be essential to provide an orderly transition period of a minimum of one year, to allow time for thousands of pages of previously incorporated material to be printed in the CCR in full. Suddenly declaring thousands of duly adopted incorporated regulations to be invalid would be costly and disruptive, to both state agencies and the regulated public.

CONCLUSION

For the reasons set forth above, OAL finds that the Manual has been properly adopted pursuant to the APA and is thus valid. Material that has been properly incorporated by reference into the CCR is no less valid than material that has been printed in the CCR.

DATE: August 5, 1998



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ENDNOTES

1. This Request for Determination was filed on March 27, 1991 by David Rosenberg (at the time with the Law offices of Diepenbrock, Wulff, Plant and Hannegan). The Law Offices of David Rosenberg are currently located at 503 Third Street, Davis, California 95616, phone (530) 750-3000.

The Department of Rehabilitation, 830 K Street Mall, Room 305, Sacramento, CA 95814 (916) 445-0186 responded to the request on June 4, 1998 by letter signed by Gwynne Pratt Bacigaluppi, Staff Counsel.

2. Welfare and Institutions Code section 19356, subdivision (a), provides:

“(a) The department shall adopt regulations to establish rates for work-activity program services subject to the approval of the Department of Finance. The regulations shall provide for an equitable ratesetting procedure in which each specific allowable service, activity, and provider administrative cost comprising an overall habilitation service, as determined by the department, reflects the reasonable cost of service. Reasonable costs shall be determined biennially by the department, subject to audit at the discretion of the department.”

3. Title 9, CCR, section 7337 provides:

“The Habilitation Services Ratesetting Manual dated July 1, 1983, and revised July, 1996, (hereinafter called “the Ratesetting Manual”) is regulations as defined by Government Code Section 11342 subsection (g), and is hereby incorporated by reference and made a part of these regulations. Persons desiring copies of the regulations and/or ratesetting manual may purchase them from the Department of General Services, Documents and Publications, P.O. Box 1015, 4675 Watt Avenue, North Highlands, California 95660 at a price covering the cost of printing.”

4. (1979), p. 690, col. 1.

5. Letter of May 11, 1998, p. 2.

6. The requester suggests that material has not been adopted as a regulation pursuant to the APA unless the material is “published” in the CCR. OAL disagrees. Government Code section 11340.5 does not state that an agency rule is an underground regulation unless published in the CCR, it merely says that an agency rule must be “adopted as a regulation and filed with the Secretary of State.”

7. In many cases, users may well *prefer* to deal with incorporated documents. Documents published by the American National Standards Institute (“ANSI”) are often incorporated by reference into the CCR. In such situations, many users will have copies of the ANSI standard at their work stations. Reprinting in the CCR a document as widely distributed

as an ANSI standard could have the following negative consequences: (1) users would have to contend with two sets of page numbers; (2) users might have to purchase a copy of the CCR volume containing the reprinted standard. If all documents presently incorporated were printed out in full in the CCR, the CCR would increase significantly in size, becoming more cumbersome and more expensive.

8. Title 1, CCR, section 20, adopted in 1986. Section 20 provides:

“(a) ‘Incorporation by reference’ means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

(b) Material proposed for ‘incorporation by reference’ shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. Except as otherwise specified in Section 11 of these regulations, OAL shall not review material proposed for “incorporation by reference” for compliance with the applicable standards of Government Code Section 11349.1 when a California statute or other applicable law specifically requires the adoption or enforcement of the incorporated material by the rulemaking agency.

(c) An agency may ‘incorporate by reference’ only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code Section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by Section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

(5) The regulation text specifies which portions of the document are being incorporated by reference.

(d) If the document is a formal publication reasonably available from a commonly known or identified source, the agency need not provide six duplicate copies of the document under Government Code Section 11343(c).

(e) Where a regulation which incorporates a document by reference is approved by OAL and filed with the Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all provisions of the APA.

9. The requester is in substance arguing that the Legislature repealed by implication the longstanding practice of incorporating regulations by reference into the CCR. Courts do not favor repeals by implication. *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 6-7, 128 Cal.Rptr. 673, 676-77.
10. *Trailer Train v. State Board of Equalization* (1986) 180 Cal.App.3d 565, 579, 225 Cal.Rptr. 717, 724.